Divorce and Estate Planning During the COVID-19 Pandemic

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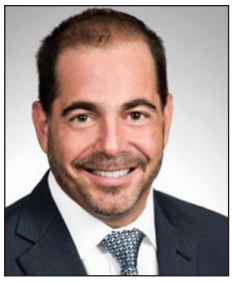
What a year it has been! With surprises around every corner, 2020 has certainly introduced new challenges for married couples worldwide. Indeed, COVID-19 has impacted us all.



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Introduction

For some couples, quarantining with their spouse has been a blessing in disguise – a chance to deepen their bond and strengthen their relationship as a couple, and a chance to spend time with their children as a family. For others, quarantining with a spouse has undoubtedly caused new pressures and revealed marital issues that may not have otherwise been uncovered or dealt with for some time. It seems probable that a pandemic-driven storm of divorce filings is pending, although possibly clients await more "normal" social times before filing. So too, 2020 has created a perfect storm for estate planning and has led to an overwhelming demand for services.

The onset of the COVID-19 pandemic led many clients to their estate planners. First, those who had been procrastinating (either starting or finishing their plans) came out of the woodwork to complete their planning out of fear of the pandemic's impact. Second, many clients (perhaps with too much time on their hands) began to question their own mortality in light of pandemic fears, leading to a surge of both old and new clients wanting to explore and revise their estate plans. Most recently, fears of 2021 tax changes post-election are leading to a stampede of irrevocable trust planning.

Thus, the pandemic has uniquely impacted both practice areas. Further, it is anticipated that many new divorce filings will occur, and those divorcing clients will need to explore their estate plans. Therefore, as you speak to your clients who are filing or going through a divorce during the COVID-19 pandemic, be sure to raise the following issues and stress the importance of estate planning in light of this significant life change and the added mortality risk associated with these times.

Estate Planning is Vital Whenever a Divorce is Filed

As a general rule, any client involved in a dissolution of marriage should meet with an estate planning attorney as early in the process as possible. Reviewing a divorcing client's estate plan (or creating an estate plan if the client does not yet have one) immediately after a filing is vital and necessary in order to confirm that the client's assets will pass to the intended beneficiaries and to ensure the appropriate fiduciaries are nominated to act on the client's behalf. In the absence of such an estate planning review, it is extraordinarily likely that a divorcing client who dies or becomes incapacitated prior to a Final Judgment of Dissolution will leave her estate in a manner inconsistent with her true wishes and intent.

For example, should a client become incapacitated during the pendency of a divorce action without a new estate plan in place, or prior to updating the estate planning documents that were created when the marriage was intact, it is probable that the client's spouse will have far more control over the client's affairs than intended. The not-quite-yet-ex-spouse will likely have financial decision-making authority (under a Durable Power of Attorney) and health/medical decision-making authority (under a Designation of Health Care Surrogate, Living Will and/or Declaration of Preneed Guardian Form). However, had the client consciously considered and reviewed her estate planning documents after filing for divorce, experience tells us she would almost certainly have changed those documents and nominated alternate decision-makers.

Furthermore, should a client die during the pendency of a divorce without an estate plan in place, without a new estate plan in place, or prior to updating the estate planning documents that were created when the marriage was intact, it is probable that the client's spouse will needlessly and unfortunately inherit far more than the client actually intended at the time of death. Again, experience tells us that if the client consciously considered and reviewed her estate planning documents after filing for divorce, she would almost certainly have changed those documents to reduce (as much as legally possible) the share of her estate passing outright to her not-quite-yet-ex-spouse.

Consider a typical scenario in which a married couple creates an estate plan after having their first child. That client's estate plan likely leaves her entire estate to her spouse and nominates her spouse to serve in various fiduciary roles, both in the event of the client's incapacity and upon the client's death.

If the client becomes incapacitated at any time during the divorce proceedings, the spouse the client is in the process of divorcing will be entitled to make financial and health care decisions on the client's behalf. In this case, simply executing new health care documents would protect the client; however, unless the client's divorce counsel reminds her to revise her estate plan, she may not realize how vital it is to contact an estate planner as soon as the divorce begins.

Further, Florida law provides that the provisions of a married client's Will or Revocable Trust that affect the client's spouse become void upon divorce (i.e., entry of a Final Judgment), not upon the filing of an action for dissolution. Accordingly, if the client dies during the pendency of a divorce having not yet removed her spouse as a beneficiary and/or fiduciary under her estate planning documents, the not-quite-yet-ex-spouse will have full control over the administration of the client's estate and will possibly inherit the client's entire estate. Without visiting an estate planning attorney, the client's new (post-filing) intent may be frustrated, and the truly intended beneficiaries may be left with nothing. The same result will occur if the client fails to remove her spouse as the designated beneficiary of certain assets (e.g., retirement accounts or life insurance policies). This unfavorable result can be avoided by ensuring your clients review and update their estate planning documents as soon as the divorce process begins.

Protecting one's children is another important motivator for divorcing clients to engage in estate planning. If the client has children, the client should nominate guardian(s) to serve in the event the client and the client's spouse die leaving minor children. The client should also appoint trustees (and alternate trustees) to manage the inheritance passing to the client's children upon her death. Indeed, appointing the proper guardians for minor children and

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shielding the children's inheritances in trusts (to be managed by the trustees the client selects) may be the most important reasons for clients to meet with an estate planning attorney once a divorce has commenced.

Florida's Elective Share and Intestate Share

Florida's elective share statutes protect a surviving spouse from disinheritance, regardless of any provisions in the deceased spouse's estate planning documents to the contrary. Although Florida's augmented elective share statute may not be totally avoided during the pendency of a divorce, Florida law authorizes the use of an elective share trust, which a divorcing client should consider implementing in her Will or Revocable Trust.

By including provisions for an elective share trust in her estate planning documents, the client is able to nominate the individual or financial institution of her choice to serve as trustee of the elective share trust for her spouse. Further, since the assets are held for the client's spouse in trust (rather than being distributed to the client's spouse outright), the client can designate the ultimate beneficiaries of any assets that remain in the elective share trust upon the spouse's death. In other words, with proper estate planning initiated at the outset of the divorce, in the event of her untimely death during the pendency of the divorce, a client can keep her assets away from her husband's next spouse, and she can protect those assets for the benefit of her children as well.

If, on the other hand, the client dies with no estate plan, Florida's intestacy statutes provide that the client's surviving spouse will be entitled to the client's entire intestate estate, provided that (i) the client is not survived by any descendants, or (ii) the client is survived by one or more descendants, all of whom are also the only descendants of the client's surviving spouse and the surviving spouse has no other descendants (i.e., no children outside the marriage). If the client is survived by a descendant who (i) is not a descendant of the client's surviving spouse, or (ii) is a descendant of the client's surviving spouse, but the client's surviving spouse has one or more descendants that are not descendants of the client, then the client's surviving spouse will be entitled to one-half of the client's intestate estate. Under either scenario, the client's surviving spouse is likely to inherit more than the client would have provided for, had the client consciously planned her estate.

Estate Planning and Issues Raised by the Pandemic

For the reasons enumerated above, including the increased health risks associated with the pandemic (and likely for many other reasons as well), all divorcing clients should be referred to estate planning counsel to review their present estate plan (or the consequences of having no plan – i.e., intestacy) and should create a new estate plan in consideration of their pending divorce. However, even this act is more complicated due to the COVID-19 pandemic.

On the one hand, pre-pandemic, it was possible (maybe even easy) to arrange an in-person meeting for the client and the estate planner. Oftentimes, such meetings might coincide with meetings with divorce counsel. However, with many offices closed and many estate planners and divorce attorneys working remotely (and not engaging in such in-person meetings), arranging for this vital service now takes more effort.

Moreover, not only are there new challenges to initiating a divorcing client's estate planning, but there are also new challenges to implementing and executing such plans. For

example, pursuant to Florida law, revisions to a client's estate planning documents must be made by written instruments, which need to be signed in the presence of two witnesses, and in some cases also require a notary public. While Trust Agreements and Designations of Health Care Surrogate Forms may be executed without a notary, a Durable Power of Attorney requires a notary to be valid (specifically, a notary is required to execute any Durable Power of Attorney where the client initials certain "super powers" thereunder). A Will, on the other hand, will be validly executed so long as it is signed in the presence of two witnesses, who sign in the presence of the testatrix and in the presence of each other (i.e., so long as everyone is present while everyone signs). However, a Will can only be made "self-proved" if an affidavit is attached and executed at the time of signing, which affidavit must be notarized. Thus, while a Will may be validly executed without a notary, it will be harder and more costly to probate the Will if it is not self-proved (i.e., if it is not also notarized on the self-proving affidavit at the end of the document).

As a result of offices being closed and difficulties arranging witnessing and notarization, it has become inconvenient and perhaps nerve-wracking for clients to coordinate the execution of their estate planning documents. This is of course exacerbated considering the current emphasis on "social distancing." There are stories of people executing documents in a "drive-in" fashion, meaning they sign their documents in their car with witnesses who watch in the driveway. There are also stories of people meeting with their neighbors to sign their Wills outside their homes with everyone wearing masks, standing far apart and bringing their own pens.

Recent changes to Florida law allow for some estate planning documents to be both witnessed and notarized on-line/remotely, a change that is particularly (and coincidentally) helpful in the wake of the COVID-19 pandemic. However, it appears the use of on-line Will and Trust execution (witnessing and notarization) is both a rare occurrence and an often difficult and painful one for the client. Moreover, most clients prefer to meet their estate planners in person and have their counsel arrange and oversee the witnessing and notarizing of the documents. Unfortunately, the COVID-19 pandemic has made document executions uniquely challenging.

Conclusion

Notwithstanding the difficulties in initiating and executing estate plans, to avoid adding further stress to an already highly stressful situation, it is vital that divorce attorneys refer their clients to estate planning counsel. Providing your divorcing clients with plenty of time to effect the desired changes to their estate planning documents and to execute them in accordance with the formalities required under Florida law will certainly make your clients feel more comfortable and protected by their trusted advisors.

Of course, you want to be careful to protect yourself as well. As trusted advisors, divorce attorneys would be doing themselves and their clients a great service by fostering these estate planning discussions early (and often) in the divorce process. Further, you would be providing a valuable service by informing your clients of all potential issues (including estate-related issues) that may arise by virtue of their divorce.

Ultimately, we suggest that it be your standard practice to advise your divorcing clients to meet with an estate planning attorney as one of the initial integral steps in the divorce process.

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